United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7647

To be argued by
MARTIN H. SELMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

CONSTANTINE MONTAGNA,

Plaintiff-Appellant,

-against-

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK, and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE 1) and the BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUND,

Defendants-Appellees.

On Appeal from a Judgment of the United States District Court for the Eastern District of New York

APPELLEES' BRIEF

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APPELLEES' BRIEF

Preliminary Statement

This is an appeal from a judgment of the District Court for the Eastern District of New York (PLATT, J.,), entered October 24, 1975, which, upon cross-motions for summary judgment, granted defendants' motion dismissing the complaint as time-barred, and barred by the doctrine of res judicata or collateral estoppel (138).*

Plaintiff's claim, predicated on 42 U.S.C. §1983, is that he was wrongfully retired from his employment with the New York City Fire Department in violation of his rights to Equal Protection of the Laws pursuant to the 14th Amendment of the United States Constitution.

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*References in parentheses refer to the pages of the Joint Appendix on appeal to this Court.

He also claims a violation of the Constitution of the State of New York, Article 1, Sec. 11.(47). Plaintiff had sustained a partial permanent disability, not service-connected, and had been retired at half-pay. His claim in this action is that, whereas under the pertinent local statute firemen injured in the line-of-duty are accorded the right to remain in employment in light duty service or to retire, firemen whose disability was not service caused may either be retained in light duty or retired at the option of the Fire Commissioner. The complaint alleges that such different treatment violates plaintiff's right to Equal Protection of the Laws as to those similarly situated.

In a prior action instituted in the New York State Supreme Court, plaintiff had joined with others to obtain judicial relief. In the plaintiffs' brief to the New York Appellate Division in that action, it was argued that plaintiff had been denied Equal Protection of the Laws. The Court below in its memorandum opinion (128 et seq.) held that this action was barred both under the doctrine of collateral estoppel and by the applicable statute of limitation.

Questions Presented

1. Did the District Court properly hold that plaintiff's cause of action predicated on Section §1983 was time-barred be reason of the three-year period of limitation prescribed by New York State Law, CPLR

214 (2) applicable to actions to recover upon a liability created by statute?

2. Did the District Court properly hold that plaintiff's cause of action further was barred under the doctrine of res adjudicata and/or collateral estoppel.

Facts

(1)

Plaintiff, a New York City fireman appointed in 1938 who had attained the rank of Lieutenant, was retired on October 2, 1969, on application of the Fire Commissioner by reason of permanent partial disability not caused in the performance of his duties (53). Plaintiff's disability first appeared in 1962, at which time the Fire Commissioner relieved him from active duty and assigned him to light duty service as authorized by the pertinent provision of the New York City Administrative Code, §B19-4.0 subd. a (4). That statute provides, in part, that "if such member shall be retired * * *, the annual allowance to be paid to such member shall be one-half of the annual compensation" (98).

Another subdivision of the statute, namely subd. a (2) of §B19-4.0, provides that as to a fireman who sustained a similar disability "caused in or induced by the actual performance (of duties)* * * *, the member so disabled

shall be relieved * * * from active service at fires and assigned to (light duties), * * * or he shall be retired on his own application at not less that three-fourths of his salary" (97)

Thus, the statutory scheme was that a fireman disabled as a result of his fire-fighting duties be assigned to light duty or retired at 3/4 salary, whereas a fireman disabled but not as a result of service, may be assigned to light duty or retired at half pay.

In this action, plaintiff alleges in his complaint that his enforced retirement was contrary to the 'equal protection of the laws' provisions of the United States and New York State Constitutions (51).

(2)

On November 16, 1970 plaintiff joined with other firemen in an action commenced in the Supreme Court, New York County entitled "Sarrosick v. Lowery", seeking to enforce claimed constitutional and contract rights, obtain a declaration that their retirement was null and void, and to obtain reassignment to light duty in the Fire Department until age 65 (33). The New York State Supreme Court (Fein, J.) upon a memorandum decision after trial (15) granted judgment dismissing the complaint. Plaintiff appealed to the New York Appellate Division which affirmed without opinion (43 A D 2d 911). The Court of Appeals denied leave to appeal (34 N Y 2d 514, 1974).

In his brief on appeal to the Appellate Division, First Department, in the Sarrosick case, plaintiff argued, inter alia (107-108, 111-113):

> "We urge this Court to hold that, in law, no real basis warranting distinction between the provisions of B19-4.0 really is justified where all members of the Pension Funds, who received light duty, are and should be entitled to the same ultimate disposition on the theory of equal protection of the laws.
>
> * * * *
>
> Whether an employee has sustained a service or non-service connected injury, he has, as a member of his pertinent retirement system, specific constitutional rights extending to situations where a certification of light duty has been granted and performed. Protecting only those who sustained a service related disability and deprive others falling into a non-service category, whenever the question of light duty arises, would be contrary to the constitutional rights guaranteed employees suffering from either type of disability. To do otherwise would establish classifications favoring one over the other, thus denying the employees with a non-service connected injury of the equal protection of the laws under Article 1, Section 11 of the State Constitution. The essence of this constitutional right to 'equal protection of the laws' is that all persons similarly situated, e.g. those actually assigned rather than the right to be assigned to perform light duty work, must be treated alike. Myer v. Myer, 271 App. Div. 465, 66 N.Y.S. 2d 83, motion denied 271 App. Div. 823, 66 N.Y.S. 2d 618, appeal granted 271 App. Div. 869, 66 N.Y.S. 2d 630, aff'd. 296 N.Y. 979 (1946); and Mallary v. City of New Rochelle, 184 Misc. 66, 53 N.Y.S. 2d 643, aff'd. App. div. 878, 51 N.Y.S. 2d 91, appeal denied 268 App. Div. 914, 51 N.Y.S. 2d 758, appeal denied 294 N.Y. 839, aff'd. 295 N.Y. 712 (1944).* * * B19-4.0 and subdivision a, paragraph 4 thereunder and

> Section B19-7.83 must be read together to achieve fairness and stability in effectuating a policy of light duty. People v. Ryan, 274 N.Y. 149 (1937). A contrary position would, again, deprive those similarly situated of the equal protection of the laws.

(3)

In the District Court, cross-motions were made for summary judgment on grounds similar to those contained in the briefs herein (71-72; 80-83).

Plaintiff's statement noted that there were no issues of fact present, and argued that his retirement constituted a denial of Equal Protection of the Laws under the 14th Amendment and its companion New York State Constitutional provision.

Defendants argued for a dismissal of the complaint as time-barred under the applicable three-year statute of limitation [having been brought on April 22, 1975, more than five years after plaintiff had been retired], and as also barred by res judicata and/or collateral estoppel.

OPINION OF THE DISTRICT COURT
(128-137)

With respect to the first ground of defendants' motion for summary judgment, Judge Platt noted that plaintiff's claim for wrongful retirement accrued in October of 1969, the date of his retirement. Applying the limitations law of the forum state, the Court adhered to prior decisions of this Court holding that in

civil rights actions the applicable statute in New York was CPLR 214 (2) prescribing a three year limitation period for actions "to recover upon a liability created by statute." The Court held (132):

> "Since plaintiff's claim for wrongful retirement accrued on October of 1969, it is clear that any claim for deprivation of civil rights in connection therewith became time-barred in October of 1972, and hence his action instituted in April of 1975 is clearly barred."

With respect to the second ground of res judicata or collateral estoppel, the Court's opinion set forth portions of plaintiff's brief in the New York Appellate Division in the previous state action (134), which the Court stated "made essentially the same equal protection arguments in the prior State court action as he advances here." (135).

Judge Platt observed that such presentation constituted as elaboration of the equal protection arguments with citation o authority. As to plaintiff's claim that different issues were present in the two actions, the Court cited Brown v. DeLayo, 498 F. 2d 1173 (10th Cir., 1974), where a similar claim was rejected, the Court there holding that such claim for benefits (back pay, retirement benefits) as here, were "all ancillary to and dependent upon determination of the fundamental due process claim."

Applying the rule that once an issue has been litigated in the State Courts it may not be

relitigated in Federal Courts, Judge Platt granted plaintiff's motion for summary judgment dismissing the complaint on the ground that it was both "time and otherwise barred" (137).

POINT I

PLAINTIFF'S SECTION 1983 CLAIM IS TIME BARRED.

The rule is that in the absence of a pertinent Federal Statute of Limitations, the Federal Courts in civil rights and related cases will apply the law of limitations of the forum state. Johnson v. Railway Express Agency, 421 U.S. 454, 462, (1975). This Court has repeatedly held that the statute of limitations for a civil rights action is the one prescribed by the state for actions "to recover upon a liability created by statute." Swan v. Board of Higher Education of the City of New York, 319 F. 2d 56 (2d Cir. 1963); Kaiser v. Cahn, 510 F. 2d 282 (2d Cir. 1974); Bomar v. Keyes, 162, F. 2d 136, (2d Cir., 1947, cert. den. 332 U.S. 825 (1947), see also, Laverne v. Corning, 316 F. Supp. 629 (S.D.N.Y., 1970), modified on other grounds, 376 F. Supp. 836 (S.D.N.Y., 1974) aff'd as modified, 522 F. 2d 1144 (2d Cir. 1975);

The applicable limitations statute in New York State is Section 214(2) of the Civil Practice Law and Rules which prescribes a 3-Year limitation period

for actions to recover upon a liability created by statute.* Plaintiff's cause of action accrued in October, 1969, when he claimed he was wrongfully retired at half pay from service with the Fire Department. This action was instituted in April of 1975 considerably more than 3 years after his claim for deprivation of civil rights arose by reason of his alleged wrongful retirement.

Nor is plaintiff's argument that the Court should look favorably upon the tolling of the statute of limitations of any force in the light of the recent holding of the U.S. Supreme Court in Johnson v. Railway Express Agency, supra, 421 U.S. 454, In Johnson (at pp. 466-467), the Court discussed Burnett v. New York Central R. Co., 380 U.S. 424 (1965), relied upon by the plaintiff there as in the case at bar. In Johnson, the Supreme Court refused to toll the applicable state statute of limitation, pointing out that in Burnett, as in American Pipe Construction Co. v. Utah, 414 U.S. 538, the period of limitation derived directly from federal statutes rather than state law; that in those cases there was a substantial body or federal procedural law to guide the decision in favor of suspension, and underlying federal policy to protect that would have conflicted with a decision not to toll the statute, factors not present in Johnson.

*Although this issue need not be reached in this case, arguably the applicable statute of limitations is CPLR 217.

The same is true of the instant case, where, in addition, the issue of equal protection, sought to be again litigated, was argued and briefed by plaintiff in the state Court (see post).

Plaintiff lays stress on his contention (Br. P. 29 et seq - Point III) that his "novel" claim is so important that it should be adjudicated on its merits regardless of any period of limitation. On the contrary, we believe the equal protection claim upon which he basis his case, is so utterly without merit that it lacks viability on its face (see post). The difference between firemen disabled in city service and those injured not be reason of service is so distinct that it renders impotent any claim that the two classes are similarly situated, a necessary pre-requisite for equal protection consideration. (Cf. Perry v. St. Pierre, 518 F. 2d 184, 186 (2d Cir. 1975); Frontiero v. Richardson, 411 U.S. 677, 683 (1972).

POINT II

THE DISTRICT COURT PROPERLY HELD THAT THIS ACTION IS BARRED BY THE DOCTRINE OF RES JUDICATA OR COLLATERAL ESTOPPEL.

(1)

The gravamen of plaintiff's claim is that he was denied his state and federal constitutional rights to equal protection of the laws when the Fire Commissioner made a distinction between the class of employees which had sustained service-related disabilities, and the class

which had incurred non-service-connected disabilities, in retaining firemen who had been disabled in the performance of duty in light duty service while retiring the non-service class.

The established rule is that once an issue has been litigated in the state courts it may not again be litigated in the Federal Courts. Spence v. Latting, 512 F. 2d 93, 98-99 (10th Cir., 1975); Taylor v. New York City Transit Authority, 433 F. 2d 665 (2d Cir., 1970); Brown v. DeLayo, 498 F. 2d 1173, 1175-1176 (10th Cir. 1974).

In Lombard v. Board of Education, 502 F. 2d 631 (2d Cir. 1974), cert. den. 420 U.S. 976 (1975), the Court stated (pp. 636-637) "Of course where a constitutional issue is actually raised in the state court * * * *, the litigant has made his choice and may not have two bites at the cherry. See Thistlethwaite v. City of New York, 497 F. 2d 339 (2d Cir. 1974)."

(2)

In the case at bar, plaintiff endeavors to distinguish the issues determined in the state court action, arguing that they related to his contractual rights to continued employment, full salary and pension benefits, whereas his present federal claim is predicated on the Equal Protection Clause. This argument is without merit.

Here plaintiff's claim tendered in the state

court action was that he was entitled to the same rights and benefits, (although not disabled in the performance of his city service) accorded to those firemen who were disabled in the line of duty. His brief in the New York Appellate Division set forth his arguments with elaboration and citation of authority (107-108, 111-113), contending that protecting only those who had sustained a service disability was a denial of "equal protection of the laws under Article 1, Section 11 of the State Constitution" (112). His brief in this Court likewise argues that such classification (Br. p. 22) "adversely affected these very employment and pension rights in violation of the Equal Protection Clause under the Fourteenth Amendment of the United States Constitution and companion New York State Constitution."

The similarity of the basic issues in both courts is thus plain.

Plaintiff's reference (Br. pp. 22-23) to the case of Herendeen v. Champion International, 525 F 2d 130 (2d Cir. 1975), is inapposite. There the plaintiff did not assert the claim made in the federal action in the state action. Moreover, the demands and rights in the two actions arose out of different acts and contracts, whereas in the instant case the demands and rights arose out of the same facts and relationship,a distinction drawn in Herendeen (525 F 2d at p. 135).

In Newman v. Board of Education, 508 F 2d 277 (2d Cir), cert. den. 420 U.S. 1004 (1975), this Court held that for a preclusion to be effective "elaborations or citations of authority" must be presented in the state court and not just a mere mention of a constitutional question. Plaintiff's brief in this Court concedes that his state court brief argued the issues of denial of equal protection of laws, but contends that it had merely done so in "cursory portion" (Br. p. 20), and that therefore he should be permitted to again litigate this issue. The worth of plaintiff's present appraisal of his state court argument is best judged by its words, reproduced in the opinion below (134). It can hardly be claimed that his equal protection argument was just "a mere mention of the constitutional question." It plainly was more that that, consisting of "elaboration or citation of authority" meeting the test laid down in Newman.

The District Court properly held that the plaintiff has made essentially the same equal protection arguments in the prior state court action as he advances in the instant action and is, therefore, barred from re-litigating them under the doctrine of collateral estoppel.

(3)

At pp. 29 et seq of Appellants Brief (Point III), the appellant addresses himself to the merits of his

federal action by claiming that it was error for the court below not to have considered the issue central to his cause of action.

Appellant claims that he was the victim of a discriminatory inviduous classification by state action when he was denied the privilege to remain employed as a fireman on light duty, while this right was accorded to firemen whose disability was service-incurred in the line of duty. Appellant overlooks that in not extending this right to a firemen whose disabling condition was not caused by the performance of his duties, the dissimilarity in status between the two classes is pointed up.

The scheme of the statute, far from being arbitrary, irrational or invidious, is to give a fireman who has been permanently but partially disabled while on duty, the privilege of remaining as an employee on limited service. Such statutory treatment patently is predicated upon a legitimate public purpose and protection for those disabled while engaged in the arduous and perilous work of a fireman. Obviously there are but a limited number of positions available for non-firefighting duties, and providing a preference therefor to firemen injured in the line of duty over those who may be injured while not on duty [e.g. while skiing] has a rational basis and justification. It is apparent that members of the two classes are not similarly circumstanced, without which requirement there can be no denial of equal protection of laws. Cf. Perry v.

St. Pierre, 518 F 2d 184, 186 (2d Cir., 1975).

Nevertheless, plaintiff urges that he should be considered similarly situated because he had been assigned to light duty for a period of time prior to his retirement. This argument is fatuous as the public purpose of the statutory scheme is to reserve the right to remain in service to firemen disabled in fire-fighting. Such a distinction hardly can be considered arbitrary or inviduous, and it serves the legitmate governmental interest of protecting those injured while serving the public.

In the state court, in response to plaintiff's equal protection arguments, the brief of the defendants, equally applicable here, stated:

> "It is axiomatic that mere differences in treatment do not in themselves violate the equal protection of the laws. "The prohibition of the Equal Protection Clause goes no further than the inviduous discrimination." Williamson v. Lee Optical Co., 348 U.S., 483, 489 (1955). To like effect see Lindsey v. Normet, 405 U.S. 56, 70-71 (1972); McDonald v. Board of Elections, 394, U.S. 802 (1969).
>
> Here, the basis for differentiation is entirely reasonable and appropriate. To begin with, it must be remembered that only a limited number, out of the total number of firemen, can be assigned to limited service. Since budgetary and other considerations preclude the Fire Department from hiring an unlimited number of firemen, there must be some limit imposed on the number of men who, though unable to perform full duty, can be retained. To make limited service a matter of right for all partially disabled firemen would risk a situation where the Department becomes top heavy with men who are medically unable to perform full fire fighting duties, thereby seriously

> endangering the public. Thus, the Fire Commissioner must retain discretion to retire some limited service personnel to make room for those who can perform full duty.
>
> Allowing men who have become disabled while in the perform ce of their often highly dangerous duties a right to remain in limited service, where a similar right is not given to those with non-service connected disabilities, is a reasonable recognition of the difference between the two forms of disability. It is no more a violation of equal protection of the laws that the provisions awarding higher pension to those who retire with service-connected disabilities than to those who retire with ordinary disabilities."

It is plain that the municipal legislation here at issue meets the test for validity as laid down by the United States Supreme Court in Frontiero v. Richardson, 411 U.S. 677 (1972), where it was said (p. 683):

> "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest [citations omitted]."

We submit that it would be contrary to reason or logic to conclude the classification spelled out by the municipal ordinance is either 'patently arbitrary' or devoid or any legitimate public interest.

CONCLUSION

The judgment appealed from dismissing the complaint should be affirmed, with costs.

March 15, 1976.

Respectfully submitted,

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MARTIN H. SELMAN,
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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 15 day of MAR. 1976, he served the annexed APPELS BRIEF upon HOWARD C. FISCHBACK Esq., the attorney for the PLTFF - APPLT. herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 78-15 221ST ST. in the Borough of QUEENS, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

15 day of MAR. 1976

WILLIAM MULBERG
Commissioner of Deeds
City of New York - No. 3-1669
Commission Expires July 1, 1977

Bruce Garner

Norman Mulberg

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